No. 02-234

Supreme Court, U.S.
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In The
Supreme Court of the United States

MILAN CHEYOVICH; DIANA CHEYOVICH, Individually and as Court Appointed Guardian for Daniel Milan Lucien Cheyovich Joye and Nicolas Marc David Cheyovich Joye, minors,

Petitioners,

v.

SAN MARINO SCHOOL DISTRICT; JOHN BEUGELMAN, a.k.a. Jacques Beuglemans, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF THE CASE	1
The Incident Which Forms the Basis of this Suit	1
The French Custody Action	2
The Superior Court Action	2
Appellate Review of the Superior Court Judgment	3
The Action Before the District Court	4
The Ninth Circuit Appeal	5
THIS CASE IS NOT APPROPRIATE FOR REVIEW	6
Since Petitioners Attempted a Collateral Attack on the State Court Judgment, Certiorari Is Not Proper	6
Res Judicata and Collateral Estoppel Barred the District Court Action	7
The Argument Petitioners Had Properly Averred Civil Rights Violations in Their First Amended Complaint Does Not Present a Compelling Reason for this Honorable Court to Hear this Case	10
The Statute of Limitations Argument Presents No Compelling Reason for This Honorable Court to Grant Certiorari	11
CONCLUSION	12

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Branch v. Tunnell, 14 F.3d 449 (9th Cir.1994) 9

Delew v. Wagner, 143 F.3d 1219 (9th Cir.1998) 10

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) 6

Hal Roach Studios, Inc. v. Richard Feiner and Company, Inc., 896 F.2d 1542 (9th Cir.1990) 8

MGIC Indemnity Corporation v. Weisman, 803 F.2d 500 (9th Cir.1986) 9

Montana v. United States, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) 7

Northland Casualty Company v. Wescal Yachts, Inc., 60 F.Supp.2d 1027 (C.D.CA 1999) 9

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980) 5

In Re: Stac Electronic Securities Litigation, 89 F.3d 1399 (9th Cir.1996) 9

Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) 7

Swekel v. City of River Rouge, 119 F.3d 1259 (6th Cir.1997) 10

Williamson v. General Dynamics Corporation, 208 F.3d 1144 (9th Cir.2000) 9

Worldwide Church of God v. McNair, 805 F.2d 888 (9th Cir.1986) 6

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

28 U.S.C. Section 1257 6

42 U.S.C. Section 1983 2

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(b)(6) 9

FEDERAL RULES OF EVIDENCE

Rule 201(e) 8

UNITED STATES SUPREME COURT RULES

Rule 10 6

Rule 14.6 5

STATE STATUTES

Civil Code Section 51 (Unruh Civil Rights Act) 2

INTRODUCTION

This action arises out of disgruntled grandparents' efforts to recover from, among others, a school district, its employees, and their attorneys on the theory they were somehow responsible for petitioners' grandchildren being taken by their father, after the grandchildren's mother suddenly died. But, after a trial on the merits the State Courts of California have found no liability, and the Federal Courts which have examined this suit found it barred by the judgment in the State Court action. Notwithstanding, petitioners now seek a writ of certiorari.

STATEMENT OF THE CASE

The Incident Which Forms the Basis of this Suit.

On June 15, 1992, Jacky Bernard Joye was the non-custodial father of Daniel Joye, and Nicolas Joye.[1] (CR 200 at 4.) After Daniel and Niko's mother unexpectedly died, petitioners disputed Joye's right to raise his sons. (*Id.*) Joye removed his sons from adjacent campuses operated by San Marino Unified School District. (*Id.*) District believes both Daniel and Niko knew of the plan prior to the date of the incident. Joye successfully removed Daniel and Niko to France.

[1] Hereinafter "Niko."

The French Custody Action.

The French Courts have determined, in an opinion announced December 16, 1996, that although Joye improperly removed them from the United States, neither Daniel nor Niko should be returned. The French Court found Daniel was too old to fall within the provisions of the applicable Hague Convention, and Niko stated his desire to remain with his father. The French Court found Niko had "reached an age and degree of maturity which make it appropriate to take account of his opinion" regarding the persons to be given custody of him. Accordingly, the French Court did not order the return of either Daniel or Niko to petitioner grandmother; instead the Court made an order regarding visitation. (CR 180, Exhibit "A.")

The French Court did not make any finding regarding the means by which Joye removed Daniel and Niko from the United States – the only finding in this regard was that the removal of Daniel and Niko was unlawful.

The Superior Court Action.

On June 15, 1993, petitioners Milan Cheyovich and Diana Cheyovich filed suit in the Los Angeles County Superior Court, on behalf of themselves and on behalf of Daniel and Niko. Petitioners filed a First Amended Complaint, in the Superior Court. This First Amended Complaint purported to allege causes of action for, *inter alia*, violation of petitioners' civil rights. These Causes of Action were brought under, *inter alia*, 42 U.S.C. section 1983, and the Unruh Civil Rights Act, Civil Code section 51 *et seq.* The action was prosecuted and discovery was undertaken. (CR 190, Exhibit "A"; App. A-6 to A-7.)

District and its employees made a Motion for Summary Judgment or in the Alternative For Summary Adjudication of Issues in the Superior Court action. The Superior Court granted summary adjudication of the civil rights causes of action, among other things. (App. A-6 to A-7.)

The Superior Court case was tried to a jury on theories of breach of mandatory duty, negligent infliction of emotional distress and negligence. Nonsuit entered against Daniel and Niko on all causes of action which survived the summary judgment motion, and against petitioners on all surviving causes of action, except for negligence against District, Meye, Santley, and Johnson. Judgment was entered for nearly $1.4 million in favor of petitioners, and against District, Meye, and Santley. (App. A-7 to A-8.)

District, Meye and Santley, brought motions for a new trial and judgment notwithstanding the verdict. The Superior Court granted the motion for new trial, and denied the motion for judgment notwithstanding the verdict. (App. A-8.)

Appellate Review of the Superior Court Judgment.

Petitioners appealed from the new trial order, and from various pretrial motions, including the summary judgment motion. San Marino Unified School District, Meye and Santley cross-appealed. (App. A-8.) The California Court of Appeal affirmed the ruling on the summary judgment motion (App. A-10 to A-15), affirmed the nonsuit (App. A-19 to A-23), and reversed the denial of the motion for judgment notwithstanding the verdict. (App. A-24 to A-26.) The Court of Appeal ordered entry of judgment in favor of

San Marino Unified School District, Meye and Santley, and against petitioners.

In making its ruling, the Court of Appeal noted there was no evidence of a conspiracy between Joye and any District employee. In fact, the Court of Appeal stated: "Appellants apparently contend the school employees had prior knowledge of Joye's plans and aided him in carrying them out. The evidence, however, does not support this contention. In fact, the evidence establishes conclusively Joye acted alone and only enlisted the aid of the children in carrying out his plan." (App. A-11 to A-12.)

The California Supreme Court denied petitioners' petition for review. (CR 190, Exhibit "C.")

The Action Before the District Court.

Before the matter was tried in the Superior Court, petitioners brought an action in the United States District Court for the Central District of California. (CR 1.) The District Court stayed the action to await the outcome of the Superior Court action. (CR 73.)

Upon resolution of the State Court action, the District Court lifted the stay. (CR 136.) The District Court granted Jacques Beuglemans' motion to dismiss, and the petitioners appealed, *Cheyovich v. Beuglemans*, Ninth Circuit Docket Number 00–55905.

By way of a motion in the District Court, petitioners sought, and received, leave to amend their complaint. (CR 179.) An excerpt of the State Court of Appeal opinion was attached as an exhibit to the First Amended Complaint. (CR 200, Exhibit "12.") DISTRICT, and the other remaining defendants, moved to dismiss the First Amended Complaint.

(CR 203.) Petitioners' opposition is significant because in it: (1) petitioners made clear the only District-related parties they intended to proceed against were District, Meye, Santley, Johnson, Anderson and WALSH & DECLUES, LLP[2] (CR 211 at 2.), and (2) petitioners argued the District Court ought not take judicial notice of the state Appellate Court opinion. (CR 211 at 6-11.) The District Court granted as to San Marino Unified School District and its employees with prejudice, based upon res judicata. (CR 7-8.) The District Court dismissed without prejudice but without leave to amend as to the state-law claims against the other defendants. (App. 9.)

The Ninth Circuit Appeal.

Petitioners appealed from the District Court ruling. After briefing,[3] the Ninth Circuit affirmed. (App. 1-4.) That Court found that the District Court action and the State Court action were "inextricably intertwined," and therefore the dismissal was proper. (App. 2.)

Petitioners sought, and were denied, rehearing. (App. 10.) This petition followed.

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[2] Hereinafter collectively "DISTRICT."

[3] Of the District-related parties, only San Marino Unified School District, Charles Johnson, Mary A. Meye, and Perta Santley were appellees. Therefore only they are respondents to the Petition. Rule 14.6; *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 783 fn.14, 100 S.Ct. 2467, 2474 fn. 14, 65 L.Ed.2d 506 (1980).

THIS CASE IS NOT APPROPRIATE FOR REVIEW

Procedurally and factually, this case is not appropriate for review by this Honorable Court. No compelling reason exists to grant the requested writ. Yet, a compelling reason is required by this Honorable Court's Rule 10.

Since Petitioners Attempted a Collateral Attack on the State Court Judgment, Certiorari Is Not Proper.

In the District Court action, petitioners attempted a collateral attack upon the State Court judgment in favor of DISTRICT. But, the District Court had no authority to review the final determinations of a State Court in judicial proceedings. 28 U.S.C. section 1257; *Worldwide Church of God v. McNair*, 805 F.2d 888, 890-891 (9th Cir.1986). This doctrine applies even when the challenge to the State Court decision involves federal constitutional issues, equal protection rights, or federally protected due process. 805 F.2d at 891. The District Court is without authority to review the final determinations of State Courts in judicial proceedings. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 463-464, 476, 103 S.Ct. 1303, 1305, 1311, 75 L.Ed.2d 206 (1983). Of course, the State Court proceedings were judicial since they "involved a 'judicial inquiry' in which the court was called upon to investigate, declare, and enforce 'liabilities as they [stood] on present or past facts and under laws supposed already to exist.' *Prentis v. Atlantic Coast Line*, 211 U.S., at 226, 29 S.Ct., at 69." *Id.* at 479, 103 S.Ct at 1313, 75 L.Ed.2d 206.

Since the action was filed in the District Court based upon federal question jurisdiction, and the issues giving

rise to the federal question had already been decided in the State Court, the District Court was without jurisdiction. *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 1012, 140 L.Ed.2d 210 (1998). If this action had proceeded, the jurisdiction of this Honorable Court would not have been on the merits, but merely for the purpose of correcting the error of the lower Court in entertaining the suit. *Id.* at 95, 118 S.Ct. at 1013, 140 L.Ed.2d 210. Of course, since the action did not proceed, certiorari is not appropriate in this case.

Res Judicata and Collateral Estoppel Barred the District Court Action.

A fundamental precept of common-law adjudication is that a right, question or fact distinctly put in issue and directly determined by a Court of competent jurisdiction cannot be relitigated in a subsequent suit between the same parties or their privies, under the doctrines of res judicata and collateral estoppel. *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979). Because petitioners freely and without reservation submitted their federal claims for decision by the State Court, and had them decided there, the District Court action was barred by res judicata and collateral estoppel. *Id.* at 163, 99 S.Ct. at 978, 59 L.Ed.2d 210.

Here, petitioners wish to avoid the impact of res judicata and collateral estoppel. However, review of the State Court of Appeal's opinion reveals petitioners raised their federal civil rights claims in the State Court suit. (App. A-13 to A-15.) In fact, although it does not appear to be necessary to this Court's determination, it appears collateral estoppel bars the issues the District Court

dismissed without prejudice, but without leave to amend. (App. 8, App. A-8 to A-10.)

Nor can petitioners reasonably assert any unfairness in the State Court proceeding. The Superior Court's denial of District and its employee's motion for judgment notwithstanding the verdict was reversed by well-respected Justices of the California Court of Appeal. The California Supreme Court denied review. While petitioners have asserted impropriety by counsel and the Trial Judge, these issues have been investigated by the State Bar of California regarding the charges against counsel (CR 190, Exhibits "I," "J," and "K."), and by an independent Superior Court Judge sitting in a different county regarding the purported prejudice of the Trial Judge. (CR 190, Exhibit "B.")

Collateral estoppel and res judicata would bar litigation of petitioner's suit. This Honorable Court may properly deny the requested Writ of Certiorari.

And although petitioners have asserted the District Court improperly took judicial notice of the State Court appellate opinion, that is not the case. Petitioners' reliance on Federal Rule of Evidence 201(e), is misplaced. First, an excerpt of the opinion is attached to the First Amended Complaint – the pleading at issue in the motion to dismiss. Second, a substantial portion of petitioners' opposition to the motion to dismiss was addressed to the propriety of taking the judicial notice.

Since a partial copy of the opinion is attached to the First Amended Complaint, the District Court properly examined the entire opinion. *Hal Roach Studios, Inc. v. Richard Feiner and Company, Inc.*, 896 F.2d 1542, 1555, fn.19 (9th Cir.1990). A document is not outside the pleading if the complaint specifically refers to the document and its

authenticity is not questioned. *Branch v. Tunnell*, 14 F.3d 449, 453-454 (9th Cir.1994). The document may be considered even if it is not attached to the complaint, under those circumstances. *Id.* at 454. The Court may properly consider the full text of a document, including portions of the document which were not mentioned in the complaint. *In Re: Stac Electronic Securities Litigation*, 89 F.3d 1399, 1409, fn. 4 (9th Cir.1996).

The District Court properly took judicial notice of the opinion of the State Court of Appeal, and could have taken judicial notice of the decision of the State Bar of California. *MGIC Indemnity Corporation v. Weisman*, 803 F.2d 500, 504 (9th Cir.1986). A District Court may take judicial notice of official records and reports without converting a Rule 12(b)(6) motion into a Motion for Summary Judgment. *Northland Casualty Company v. Wescal Yachts, Inc.*, 60 F.Supp.2d 1027, 1028 (C.D.CA 1999).

Even if the claims for relief are not barred by res judicata, they are barred by collateral estoppel. The elements of collateral estoppel are set forth in *Williamson v. General Dynamics Corporation*, 208 F.3d 1144, 1157, fn.4 (9th Cir.2000).

Here, the State Court found that there were no civil rights violations committed by District or any of its employees with respect to petitioners, that there was no evidence that District or its employees conspired with or assisted Joye in his plan to remove Daniel and Niko from the country, that neither District nor its employees was negligent with respect to the removal of Daniel and Niko from the country, and that petitioners were not damaged. Petitioners are collaterally estopped from maintaining vital elements of each claim for relief.

The Argument Petitioners Had Properly Averred Civil Rights Violations in Their First Amended Complaint Does Not Present a Compelling Reason for this Honorable Court to Hear this Case.

Petitioners' assertion the District Court stated the petitioners cannot join non-state actors under section 1983 claims misinterprets the ruling. The District Court found that since there was no violation of petitioners' federal civil rights, there could have been no conspiracy to violate those rights. (App. 7-8.) Neither the District Court nor the Ninth Circuit examined the issue urged by petitioners. Accordingly, this issue does not present a compelling reason for this Honorable Court to grant the requested writ of certiorari.

Similarly, petitioners' reliance on *Delew v. Wagner*, 143 F.3d 1219 (9th Cir.1998) is of no assistance to them. There, the Court found plaintiffs might be able to allege a claim for relief after resolution of the then-pending State Court action, if they were able to "demonstrate that the defendants' cover-up violated their right of access to the courts by rendering 'any available state court remedy ineffective.'" 143 F.3d at 1223 (citing *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir.1997).) In this case, petitioners have not pointed to any improper action which denied them access to the State Courts. Petitioners' only real complaint is that they do not like the results obtained. There is simply no basis upon which to find plaintiffs were denied meaningful access to the State Courts. In fact, the allegations of conspiracy were raised in the State Court action and were examined by the State Court of Appeal. (App. A-8 to A-10.) Therefore, petitioners are essentially requesting an examination of what they see as an incorrect factual finding in the State Court.

While petitioners have argued the State Court proceeding was unfair to them, petitioners had every opportunity to raise this unfairness before the Trial Court, and before the Court of Appeal. This case does not present a compelling reason to grant certiorari.

The Statute of Limitations Argument Presents No Compelling Reason for This Honorable Court to Grant Certiorari.

Although the statute of limitations argument in the Petition appears to be primarily directed at Beuglemans, it could be read broadly enough to encompass parties who were defendants in the District Court – even those not respondents in this Petition. Regardless, given the basis for the decision in the District Court, and in the Ninth Circuit Court of Appeals, no issue worthy of this Honorable Court has been presented.

CONCLUSION

No issue worthy of this Honorable Court's time has been presented in the Petition. Petitioners improperly seek review of the issues decided by the State Courts. Collateral estoppel and res judicata provide complete bars to the claims raised in the District Court.

This Honorable Court may properly deny the Petition.

DATED: September 13, 2002

Respectfully submitted,

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DIANA CHEYOVICH, et al., Plaintiffs and Appellants, v. SAN MARINO UNIFIED SCHOOL DISTRICT, et al., Defendants and Respondents.	B110228 (Super. Ct. No. G010140) (Filed Aug. 23, 1999)

APPEAL from orders and judgment of the Superior Court of Los Angeles County. Judge J. Michael Byrne and Judge Coleman A. Swart. Affirmed in part and reversed and remanded in part with directions.

Milan Cheyovich and Diana Cheyovich, Plaintiffs and Appellants in propria persona.

Walsh & Declues, J. Michael Declues and Gregory A. Wille for Defendants and Respondents San Marino Unified School District, Mary A. Meye, Perta Santley, Jeanne Lipps, Sheryl Goodreau, Jack R. Rose, Carol Miller, Charles Johnson and Gary R. Richards and Cross-Appellants San Marino Unified School District, Mary A. Meye, and Perta Santley.

Appellants Milan Cheyovich and Diana Cheyovich (the Cheyoviches) appeal from an order granting a new trial in their action for damages and injunctive relief based upon their son-in-law's allegedly wrongful taking of

appellants' minor grandchildren Daniel and Niko Cheyovich from their school. The Cheyoviches also appeal from various pretrial orders relating to discovery, sanctions, dismissal of the minor plaintiffs from the action, summary judgment, and ten pretrial motions filed by appellants. Respondents San Marino Unified School District, Mary A. Meye, Perta Santley, Jeanne Lipps, Sheryl Goodreau, Jack R. Rose, Carol Miller, Charles Johnson and Gary R. Richards cross-appeal the judgment as well as the trial court's denial of their motions for non-suit and judgment notwithstanding the verdict.

We conclude the trial court correctly granted summary judgment or non-suit in respondents' favor on all causes of action except for the negligence claim. We also conclude the trial court erred in denying respondents' motion for judgment notwithstanding the verdict on the negligence claim. Because these holdings mandate entry of judgment in respondents' favor, we do not consider whether the trial court erred in granting respondents' new trial motion, and instead remand this matter to the trial court and direct judgment be entered in favor of respondents on all causes of action of appellants' first amended complaint. We also affirm the trial court's order denying appellants' ten pretrial motions and awarding of sanctions to respondents.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

The Cheyoviches are the parents of Joan Cheyovich and the grandparents of Daniel and Niko Cheyovich. In March 1992, Daniel and Niko were ages 11 and 9, respectively, and living with their mother Joan Cheyovich at the Cheyoviches' home in San Marino. Daniel and Niko attended school at Henry E. Huntington School and Valentine Elementary School, which were schools run by respondent San Marino Unified School District (San Marino).

Joan Cheyovich was divorced from the boys' father, Jacky Bernard Joye (Joye), a French citizen who lived in France. Joan had been awarded custody of the two boys by a French court, although the boys were United States citizens. In March 1992, Joan unexpectedly died. After her funeral, Joye discussed with the boys whether they desired to live in the United States with appellants, or return to France and live with him. Both Daniel and Niko said they wished to return to France. Joye determined the boys should remain with appellants until June, in order to complete the school year, and allow Joye to arrange for child care in France. Joye advised appellants of these plans, and provided money to appellants to assist in supporting the boys until June.

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[1] We granted appellants' request to take judicial notice of the files in connection with their petition for writ of mandate and stay of proceedings filed in connection with the denial of their motion to disqualify Judge Swart pursuant to Code of Civil Procedure section 170.6 (Appeal Nos. B109078 and B111048).

However, on May 8, 1992, the Cheyoviches obtained ex parte letters of temporary legal guardianship of Daniel and Niko, purportedly to authorize any necessary medical treatment for the boys, and apparently in part based upon representations Joye did not intend to claim custody of the children. The temporary guardianship was set to expire on June 18, 1992; consequently, a hearing was scheduled for June 18, 1992, to issue the Cheyoviches letters of permanent guardianship. In spite of Joye's intent to take the boys, the Cheyoviches did not want to relinquish the children and they were fearful Joye would attempt to abduct the boys. Diana Cheyovich discussed these concerns with the administrators at both Henry E. Huntington School and Valentine Elementary School. Joan Cheyovich gave them copies of the letters of temporary guardianship and explained the boys were not to be released to anyone other than the Cheyoviches. She also spoke with the San Marino Police Department and was promised the Police Department's full cooperation and immediate response to any calls from respondents regarding Joye's presence at either school.

Nevertheless, on June 15, 1992, pursuant to a prearranged plan with the children, Joye, who had returned to the U.S., picked up the children from their schools. After Milan Cheyovich drove Daniel to Henry E. Huntington School, Daniel pretended to go to class but instead waited in the parking lot and then left the school grounds where he met Joye. Daniel advised Joye to write a note to the school advising them he would not be in that day, otherwise the school would contact appellants. Joye did not speak with anyone at the school that day regarding Daniel.

Joye and Daniel then went to Valentine School to pick up Niko.[2] Joye confronted the school's principal, respondent Mary Meye (Meye). Meye told Joye he could not take Niko because of the court order granting temporary guardianship to the Cheyoviches. Joye left Meye's office but told her would be back. Meye contacted Perta Santley (Santley), Niko's teacher, and asked her to come to the office. Santley, who was in the teachers' room at the time because school had not yet started, met Joye as she exited the room. Joye handed her a letter and stated he had come to get Niko. Joye then asked Santley how to get to the playground and then stated he would find it himself. Santley went to her classroom and then went to look for Meye to report the conversation and the note, but was unable to find Meye. Santley then went back to her classroom, where her students were just beginning to come into the classroom. They told her Niko had just left with his father.

Meanwhile, Joye had returned to Meye's office and written Meye a note stating he was the sole guardian of the children and he was taking them to France. Meye refused to release Niko to Joye, explaining to Joye the import of the court order and advising him she could not release Niko because of the order. Meye realized she would be unable to stop Joye from taking Niko without the use of physical force and therefore let Joye and Niko depart.[3]

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[2] What exactly transpired at Niko's school on June 15, 1992, was the subject of factual dispute at trial.

[3] Joye testified at his deposition Meye did not try to physically stop him because "that would have been a lot to expect from her. She was a petite woman."

Meye immediately contacted San Marino's district offices. The Cheyoviches were called after Joye and the children had left; however, it is disputed whether the police were called. No one at the school, including respondent Charles Johnson, knew of Joye's plan to take the children that day. Neither Sheryl Goodreau, Jeanne Lipps, Jack R. Rose, Carol Miller nor Gary Richards knew anything about Joye's presence on the school grounds or his actions.

The children are currently in France with Joye. Appellants have been unsuccessful in their attempts to recover their grandchildren through international channels.

Appellants, on behalf of themselves and as guardians on behalf of the minors Daniel and Niko,[4] commenced the within action stating ten causes of action against San Marino and its employees[5] and Joye for (1) abduction, (2) negligence, (3) failure to discharge mandatory duty, (4) conspiracy to abduct children in violation of court order, (5) intentional infliction of emotional distress, (6) negligent infliction of emotional distress, (7) violation of Unruh Civil Rights Act, (8) deprivation of rights under color of state law (42 U.S.C. § 1983), (9) conspiracy for deprivation of constitutional rights (42 U.S.C. §§ 1985, 1988), and (10)

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[4] The record contains no copy of any order appointing appellants guardians *ad litem* for Daniel and Niko, although the complaint alleges Diana Cheyovich was the lawful guardian of the children by virtue of the temporary guardianship order.

[5] Appellants later voluntarily dismissed seven school district defendants originally named in the first amended complaint. The remaining defendants were respondents Mary A. Meye, Perta Santley, Jeanne Lipps, Sheryl Goodreau, Jack R. Rose, Carol Miller, Charles Johnson and Gary R. Richards.

injunctive relief. Respondents filed a summary judgment motion which disposed of all the causes of action except for breach of mandatory duty, negligent infliction of emotional distress, and negligence.

Shortly thereafter, appellants brought six motions for, among other things, new trial (based on the summary judgment motion), motion to vacate [summary] judgment, motion to recuse district's counsel, motion for sanctions, motion to reopen discovery, and a motion for whatever other relief was required. The motions were denied on the grounds they failed to comply with Superior Court Local Rule 9.3.[6] Appellants then filed four additional motions, including a motion to vacate judgment, to recuse counsel for the district, to amend the complaint, and to reopen discovery. These motions were also denied. (Collectively, these motions are referred to by the parties as the "Ten Motions.")

The matter went to trial before a jury. At the close of appellants' case, respondents moved for nonsuit on the mandatory duty, negligence and negligent infliction of emotional distress claims. The court granted nonsuit as to all defendants on the mandatory duty and negligent infliction of emotional distress claim. Nonsuit was also granted in favor of the remaining defendants except for San Marino, Meye, Santley and Johnson on the negligence cause of action.[7] The court granted nonsuit as to Niko and Daniel on the grounds they had suffered no damages.

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[6] This rule requests the parties to provide translations of foreign language documents attached as exhibits.

[7] The Order says nothing about the negligence claim, instead stating the motion is denied as to appellants' claim for "damages."

The jury returned a verdict of $1,399,382 in favor of appellants against San Marino, Meye, and Santley. These respondents moved for a new trial and a judgment notwithstanding the verdict. The trial court indicated unless the parties could settle the matter, it would grant the motion for a new trial. While settlement was pending, appellants discharged their counsel. The trial court denied respondents' motion for judgment notwithstanding the verdict without explanation. The trial court granted their motion for a new trial on the grounds of juror misconduct (quotient verdict), excessive damages, and misconduct by counsel (improper closing argument), insufficient evidence of causation, and insufficient evidence of damages. Appellants timely appealed and respondents timely filed a cross-appeal.

DISCUSSION[6]

I. APPELLANTS' DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE TAKING OF THE DEPOSITIONS OF JOYE, NIKO AND DANIEL.

Appellants contend the trial court erred in denying their motion to quash the depositions and for protective

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[6] Appellants have requested we incorporate all issues and authorities from Appeal No. B 098163, an appeal taken from the denial of appellant's motion for summary judgment, a non-appealable order. To the extent the arguments are not merely duplicates of arguments made in the instant appeal, they are addressed separately in this opinion. We also point out the correct case number of the prior appeal is B098164. Appellants' failure to give this court the correct case number caused this court considerable confusion and inconvenience while the correct documents were located, resulting in a waste of this court's valuable time and resources.

order. Appellants contend respondents were required to follow the Hague Convention and counsel's failure to do so also violated the Rules of Professional Conduct as well as their due process rights. (*Pierburg GmbH & Co. KG* v. *Superior Court* (1982) 137 Cal.App.3d 238, 244-245 [procedures for depositions]; *Henrikson* v. *Great American Savings & Loan* (1982) 111 Cal.App.3d 103, 114 n.5.) Appellants also contends error occurred because the notices of deposition provided the depositions to be videotaped, but in fact they were not and this permitted Joye to "wantonly and arrogantly manipulate . . . the minor appellants' testimonies." Respondents do not challenge this contention in their brief.

We find no error. The Hague Convention is an international treaty which governs the conduct of discovery with foreign citizens in foreign countries. It specifies certain procedures to be followed in obtaining such discovery. (See *Pierburg, GmbH & Co. KG* v. *Superior Court, supra*, at pp. 241-243.) However, appellants have not specified how the particulars of the Hague Convention were not complied with, and we therefore cannot evaluate their arguments on appeal.

In addition, appellants have not demonstrated how they were harmed by the taking of this discovery.[9] First, Joye was an adverse party, so appellants can raise no complaint on his behalf for the taking of his deposition. Second, appellants were apparently never appointed guardians ad litem for Niko and Daniel, and they therefore lack

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[9] Indeed, appellants' real complaint seems to be the discovery produced factual declarations which were adverse to them.

standing to bring any argument on behalf of Daniel and Niko, who therefore have the status of third parties in this litigation. (Code Civ. Proc. § 372(a); *J.W.* v. *Superior Court* (1993) 17 Cal.App.4th 958, 964-965 [counsel must appear on behalf of minor even though guardian may appear on their own behalf in propria persona].) Finally, appellants have provided no factual basis for their assertions the children's testimony was manipulated in any fashion.

II. RESPONDENTS' SUMMARY JUDGMENT MOTION WAS CORRECTLY GRANTED.

Appellants contend the trial court erred in granting respondents' summary judgment motion on the third, fourth, fifth, seventh, eighth and ninth causes of action for failure to discharge mandatory duty, conspiracy to abduct children in violation of court order, intentional infliction of emotional distress, violation of Unruh Act, violation of civil rights under color of state law, and conspiracy to deprive appellants of their civil rights. Appellants contend they provided facts in support of their opposition which established triable issues of fact existed. Respondents argue the summary judgment motion should also have been granted as to the second and sixth causes of action (denied by the trial court) for negligence and negligent infliction of emotional distress because the school district's employees may only be held liable for their own acts and omissions. We discuss this latter argument in connection with the motion for non-suit and for judgment notwithstanding the verdict, *infra*.

A. The Trial Court Properly Granted Summary Judgment on the Fourth Cause of Action for Conspiracy to Abduct Children.

First, appellants contend respondents' and Joye's depositions established a prima facie case of conspiracy, joint venture, mutuality of agency, common scheme, plan, and concert of actions. Appellants contend although the conspiracy was initially directed at the kidnapping and abduction, the conspiracy is still ongoing, and is now in the "cover-up stage." Appellants contend the existence of such a conspiracy was a fact question for the jury. (See *Wyatt* v. *Union Mortgage Co.* (1979) 24 Cal.3d 773, 784-788.) Appellants further contend in granting the motion the trial court ignored the evidence before it, including evidence of the temporary guardianship order, Diana Cheyovich's request of the teachers and other school employees, as well as the assurances and statements of the school's employees. Appellants contend these unique facts and relationships created a duty on the part of the District to take all steps to protect its students. (*Virginia G.* v. *ABC Unified School District* (1993) 15 Cal.App.4th 1848, 1853.)

Conspiracy requires (1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages. (*Kidron* v. *Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1781.) Conspiracy (i.e., the agreement) is not an independent tort; it is a method of imposing liability on co-tortfeasors for vicarious commission of an underlying tort. (*Applied Equipment Corp.* v. *Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511.)

Appellants apparently contend the school employees had prior knowledge of Joye's plans and aided him in carrying them out. The evidence, however, does not

support this contention. In fact, the evidence establishes conclusively Joye acted alone and only enlisted the aid of the children in carrying out his plan.

B. The Trial Court Properly Granted Summary Judgment on the Fifth Cause of Action for Intentional Infliction of Emotional Distress.

To recover on a claim for intentional infliction of emotional distress, the plaintiff must demonstrate (1) outrageous conduct by the defendant, (2) directed at the plaintiff with the intent of causing extreme emotional distress, (3) causing severe emotional distress to the plaintiff, and (4) plaintiff's severe or extreme emotional distress. (*Trerice* v. *Blue Cross of California* (1989) 209 Cal.App.3d 878, 883.) Outrageous conduct is conduct which exceeds the bounds of that usually tolerated in civilized society. Such conduct must be directed at the plaintiff or occur in the plaintiff's presence. (*Christensen* v. *Superior Court* (1991) 54 Cal.3d 868, 903.) The court may first determine, as a matter of law, whether facts demonstrate outrageous conduct; it is then for the jury to determine whether the defendants' conduct was in fact outrageous. (*Fuentes* v. *Perez* (1977) 66 Cal.App.3d 163, 172.)

Appellants have failed to demonstrate there was either (1) conduct which took place in their presence, and (2) conduct which was extreme and outrageous. Appellants were not present on the school grounds when the "abduction" took place. In addition, the unsuccessful attempts by the school employees to keep Joye from taking the children do not comprise the kind of conduct which is beyond the bounds of that which is tolerated by decent society. Indeed,

the facts demonstrate the school employees (to the extent they were aware of the guardianship order and/or the fact Joye was not to take the children from school) were attempting to prevent Joye from leaving with the children. This is hardly outrageous conduct.

C. The Trial Court Properly Granted Summary Judgment on the Seventh, Eighth, and Ninth Causes of Action for Violation of Appellants' Civil Rights.

Appellants' claims for civil rights violations are based upon their contentions they were discriminated against based upon their national origin. The evidence in support of their contentions consists of excerpts from their depositions. Diana Cheyovich testified at her deposition as follows: "Q. Who at the school district acted towards you in a certain way because of your national origin? . . . Are you saying the school district people didn't comply with the temporary guardian order because of your Serbian background? A. I – I feel they were more for the French than for us. Q. What makes you think that? A. They let the children go knowing they had a legal document in their hand, knowing that I had spent time telling them how vital this was. . . . Q. How would anybody at the district know you were Serbian? A. Oh, come on. It's on our applications, and everything else. I have other children there. . . . Anyone who followed the Bosnian war certainly knew about who's Serbian and who isn't. Come on. They favored Jacky. That's all. They stuck with him regardless . . . " Milan Cheyovich testified: "Q. Do you have any information that anyone at the school district acted in the way that they did in regard to the incident based upon your Serbian background? . . . A. What type of information do you want

Q. Any fact, any ideas, any witnesses, any documents? A. We don't have no witnesses, but that's our personal belief. . . . Q. But you don't have any witnesses or documents to support that? A. No, I don't. . . . Q. Did any one particular incident occur that caused you to form that opinion or contributed to your formation of that idea? A. First of all, my daughter felt that way, the time she went to the school there [to register the children]. And I think that was maybe the main reason we thought that."

1. State Law – Unruh Civil Rights Act.

California Civil Code section 51 provides, in relevant part, "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin [or disability] are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Civil Code section 52 provides damages are recoverable in a civil action against persons who violate section 51. Such an action may be brought against a school because the phrase "business establishment" is interpreted in the broadest sense possible. (See *Nicole M.* v. *Martinez Unified School District* (N.D.Cal. 1997) 964 F.Supp. 1369, 1388.)

Appellants, however, point to nothing specific to support their claims. Indeed, on summary judgment, a defendant may rely on factually devoid discovery responses in sustaining the movant's burden on summary judgment. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 580-581.) Appellants' assertions of second-hand beliefs, based upon their daughter's statements and a generalized belief that people were biased against Bosnians does not support

the kind of intentional discrimination prohibited by Civil Code section 51. (*Harris* v. *Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1152-1154, 1171.)

2. Federal Law – 42 U.S.C. Section 1983 and Sections 1985, 1988.

Appellants have failed to state a claim for conspiracy to violate their civil rights. Under 42 U.S.C. section 1983, a state may not deprive another of their rights under the laws of the United States Constitution. Section 1985 prohibits conspiracy to interfere with civil rights, and section 1988 provides procedural guidelines for prosecution of a section 1983 action. As discussed above, appellants have stated no facts to support a claim of any wrongdoing. Joye testified in his declaration he did not conspire with any of the school officials to abduct Daniel and Niko; the plan was concocted with the boys alone. Respondents, to the extent they are all employees of the same entity, could not conspire with themselves. Thus the claim for conspiracy fails. (*Black* v. *Bank of America* (1994) 30 Cal.App.4th 1, 6; *Hilliard* v. *Ferguson* (5th Cir. 1994) 30 F.3d 649, 653.)

III. APPELLANTS' SUMMARY JUDGMENT MOTION WAS CORRECTLY DENIED.[10]

Appellants moved for summary judgment on the grounds respondents' violation of school administrative

[10] Normally, a plaintiff who is victorious at trial cannot claim error based on the denial of an earlier summary judgment because the error is in effect rendered moot by the trial. (See *Waller* v. *TJD, Inc.* (1993) 12 Cal.App.4th 830, 833 [lack of prejudice to plaintiff precludes review of plaintiff's earlier summary judgment when plaintiff prevails at trial].)

regulations, student release policies, emergency card procedures and registration requirements for school visitors constituted negligence per se. (Evid. Code, § 669(a); Penal Code, § 627, et seq.) Appellants argued the foregoing school regulations, policies and procedures were designed to screen and monitor persons coming on campus to protect the students and school personnel, and also to prevent the unauthorized departure of students from campus. The trial court denied the motion on the grounds (1) Joye was a parent within the meaning of Penal Code section 627.1(a) and therefore the statute did not apply to him, nor was there a causal connection between the failure to register Joye and the harm suffered by appellants, and (2) the district office release procedures were not statutes, ordinances or regulations of a public entity within the meaning of Evidence Code section 669. The trial court also held a triable issue of fact existed "whether or not negligence per se applie[d]" to San Marino's regulations.

Evidence Code section 669 is the statutory enactment of the rule of negligence per se, and provides "(a) The failure of a person to exercise due care is presumed if: [¶] (1) He violated a statute, ordinance, or regulation of a public entity; [¶] (2) The violation proximately caused death or injury to person or property; [¶] (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and [¶] (4) The person suffering the death or injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." The first two requirements of section 669, subd. (a) are questions of fact; the latter two are questions of law for the court and cannot be the basis of a finding [sic] a triable issue of fact exists. (*Cade* v. *Mid-City Hospital Corp.* (1975)

45 Cal.App.3d 589, 596-597.) Subsection (b) provides: The "presumption [of negligence] may be rebutted by proof that: (1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." Evidence Code section 669.1 provides, in relevant part, a statute or ordinance does not come within section 669 "unless the rule manual, policy, or guideline has been formally adopted."

We find the trial court correctly denied appellants' motion for summary judgment. Appellants have not established they are entitled to the presumption of negligence under Evidence Code section 669(a). Penal Code section 627 is designed to prevent violence on campus and does not address the question of students' release from school to authorized persons; thus, appellants are not within the third requirement of the statute. In addition, any purported violation of Penal Code section 627, et seq., requiring the registration of "outsiders," could not have been a cause of appellants' injuries because Joye did not fall within the definition of an "outsider" and thus a violation of section 627 could not have occurred. We therefore hold appellants have not demonstrated they were entitled to summary judgment in their favor on the basis of negligence per se.

IV. APPELLANTS HAVE NOT ESTABLISHED ANY ERROR WITH REGARD TO THE TEN MOTIONS.

Appellants appeal from denial of their six motions (1) for new trial, (2) to vacate [summary] judgment, (3) to reopen discovery, (4) to disqualify counsel, (5) for sanctions, and (6) for any other relief. Apparently the motion

for "new trial" and to "vacate judgment" were filed in response to the trial court's denial of appellants' motion for summary judgment. The trial court denied the motions on the grounds they did not comply with Local Rule 9.3. The six motions were then re-filed as four motions, to wit: (1) motion to vacate "judgment", (2) motion to reopen discovery, (3) motion to disqualify counsel, and (4) motion to amend the complaint. These motions were also denied.

Appellants' argument in support of reversal of the orders denying these motions consists of, basically, "[t]hese motions should have been granted." However, as an appealed order is presumed to be correct, appellants bear the burden on appeal of demonstrating error. Appellants' argument, which is devoid of legal or factual analysis, does not meet this burden. (See *Marriage of Arceneaux* (1990) 51 Cal.3d 557, 564.)

V. APPELLANTS HAVE NOT ESTABLISHED THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING SANCTIONS TO RESPONDENTS.

Appellants contend the trial court erred in awarding sanctions to respondents. Appellants replaced their counsel shortly before trial, and new counsel attempted to augment appellants' expert witness list. The motion was granted on condition appellants pay all costs of the expert's deposition plus attorneys' fees. Appellants contend the trial court erred in taking off calendar its order to show cause why respondents should not be sanctioned for the failure of their counsel to appear at the first day of trial. They contend this constitutes an abuse of discretion and demonstrates bias on the part of the trial court.

We review the imposition of sanctions for abuse of discretion, and also review for abuse of discretion the trial court's determination of reasonable fees to be paid for deposition of an expert. (*Estate of Ruchti* (1993) 12 Cal.App.4th 1593, 1601; *Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 303-304.) However, in order to determine whether discretion has been abused, we not only need an adequate record, we need factual and legal support for the claim of error. (*Interinsurance Exchange of the Automobile Club of Southern California v. Collins* (1994) 30 Cal.App.4th 1445, 1448.) Appellants have provided no argument, only conclusory, unsupported statements. We thus find no error.

VI. NONSUIT WAS PROPERLY GRANTED ON THE SECOND AND THIRD CAUSES OF ACTION AND AGAINST DANIEL AND NIKO.

In reviewing a motion for nonsuit, we do not weigh the evidence or consider the credibility of witnesses. Rather, grant of a motion for nonsuit will be upheld on appeal if we determine as a matter of law the evidence presented by plaintiff is insufficient to permit the jury to find in plaintiff's favor. (*Nally v. Grace Community Church of the Valley* (1988) 47 Cal.3d 278, 291.) Appellants contend the order granting respondents' motion for nonsuit failed to determine the "joint venture" issue pursuant to paragraph 31 of the first amended complaint wherein the respondents undertook a "special relationship" by assuring Diana Cheyovich they would honor the guardianship order. Appellants contend there was no basis for dismissing Daniel and Niko from the action on the basis they had failed to establish damages because "[s]uch purported reason was biasedly fallacious[.] Evidence presented by

the [Cheyoviches of their] own damages had [to] carry over to the minor appellants. . . . But more significantly, said minor appellants had a right to recover general damages in and of [themselves] for pain, suffering, mental distress and grieving, etc. . . . "[11]

A. Appellants Have Failed to Produce Facts Sufficient to Support Their Claims for Failure to Discharge Mandatory Duty.[12]

Appellants contend respondents failed to discharge a mandatory duty under, inter alia, Education Code section 32261 [legislative declarations regarding Interagency School Safety Demonstration Act of 1985], Penal Code section 627 [access to school grounds by unauthorized persons], and unspecified statutes and ordinances regarding the release of children to the custody and control of non-designated persons.

Penal Code section 627 et seq., provide [sic] a scheme whereby "outsiders" (persons other than students, their parents or guardians, or authorized personnel of public schools) must register before being allowed onto school

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[11] Appellants argue the trial court erred in granting nonsuit because, among other things, "Judge Swart's entire outlook of Appellants' claims was one of bias," and "Judge Swart's actions and his rulings were deliberately fashioned and calculated . . . to suppress Appellants from perfecting all of their rightful claims." In the context of determining whether the motion for nonsuit was improperly granted, this is not legal argument and does not merit our attention.

[12] Respondents argue appellants have not made out a case for their negligence claim in the context of the motion for nonsuit; however, the trial court did not grant nonsuit on this claim. Therefore, we do not address those arguments here.

grounds. Reference to Government Code section 815.6 determines whether these statutory provisions imposed a mandatory duty on respondents to bar Joye from the school grounds and ensure he did not leave with Niko. Government Code section 815.6 provides: "Where a public entity is under a mandatory duty imposed by an enactment . . . designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." Case law construing this section has developed a three-part test for determining whether liability may be imposed on the public entity: (1) the enactment must impose a mandatory, not a discretionary duty; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered. (*MacDonald v. State of California* (1991) 230 Cal.App.3d 319, 327.) Whether a particular statute imposes such a duty is a question of law for the court and is based upon a reading of the statutory language and the apparent purposes of the statute. (*Id.*)

The language of Penal Code section 627 et seq., indicates it is designed to ensure the safety of school children and protect them from violent acts by preventing the unauthorized presence of persons on school grounds.[13] The statutory scheme established by section 627 does not

[13] We do not discuss whether the provisions of Education Code section 32261 provide a mandatory duty because legislative declarations are not substantive law.

impose a mandatory duty; rather, it provides guidelines that are to be followed. The governing board of a school district may exempt themselves from the operation of the chapter. (Pen. Code, § 627.9, subd. (a).) In addition, section 627 et seq., are [sic] not directed at parental custody disputes, but the commission of violent crimes on campus by non-students. Indeed, the statute specifically excludes parents *or* guardians from the definition of "outsiders" to whom the statute is applicable. Based on these factors, we conclude there is no mandatory duty arising under Penal Code section 627 et seq., regarding the release of children to their parents; and there being no duty, there can be no breach.

Furthermore, under Government Code section 815.6, liability only attaches where there has not been a reasonable attempt to discharge a mandatory duty. Therefore, even if we were to conclude such a duty existed, the evidence establishes respondents acted reasonably in their attempts to halt Joye's plan to leave school with Niko. When he threatened violence, they were not required to put themselves or other students (including Niko) in danger. Instead, they acted responsibly by calling the district and thus discharged any duty they might have had.

B. Negligent Infliction of Emotional Distress.

Negligent infliction of emotional distress is not an independent tort, but the result of another party's negligence. The cause of action is structured much like a claim for negligence, with elements of duty, breach, causation and damages. (*Marlene F. v. Affiliated Psychiatric Medical Clinic Inc.* (1989) 48 Cal.3d 583, 589.) Damages are

recoverable not based upon a duty theory that arises solely upon foreseeability. Instead, the emotional distress must result from the breach of a duty owed the plaintiff that is either assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a special relationship between the two. (*Id.* at pp. 589-590; see *Bro v. Glaser* (1994) 22 Cal.App.4th 1398 [developing two-prong test consisting of pre-existing relationship and outrageousness of defendant's conduct].) Appellants have failed to demonstrate the elements of a claim for negligent infliction of emotional distress because respondents' conduct was not outrageous, as respondents' response to the situation was not "so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Bro, supra*, at pp. 1439-1440.)

C. Nonsuit Was Proper as to Niko and Daniel.

With respect to appellants' contentions regarding the dismissal of Daniel and Niko, the right to recover damages is not the same as sufficiency of proof thereon. Appellants' claims of costs incurred by the minors is not supported by the argument the Cheyoviches' own costs had to "carry over" to the children. The claims of mental suffering and anguish are not supported by the children's declarations, in which they both state "I am happy and healthy living with my father in France. I live with my father by choice." Because the record is devoid of any evidence which would persuade us the trial court erred in finding no damages had been incurred by the children, the order granting nonsuit is upheld.

VII. THE TRIAL COURT ERRED IN DENYING RESPONDENTS' MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT.

Respondents contend the trial court erred in denying their motion for judgment notwithstanding the verdict on appellants' claim for damages based on negligence because appellants have failed to establish respondents were negligent under an ordinary standard of care, and appellants have failed to prove respondents accepted a higher duty of care to appellants. (See *Hayem v. Manhattan Beach City School District* (1978) 22 Cal.3d 508, 513.) Respondents contend appellants have failed to prove essential elements of the negligence claim, causation and damages, because appellants cannot establish they would have obtained a different result in the custody proceeding had the children not been abducted.

In reviewing the trial court's denial of a motion for judgment notwithstanding the verdict, we determine whether there is substantial evidence, either contradicted or uncontradicted, supporting the jury's conclusion. If a finding of fact is attacked on the grounds there is no substantial evidence to support it, our inquiry begins and ends with the determination as to whether any substantial evidence supports the finding. When two or more inferences can be drawn from evidence, we do not substitute our deductions for those of the trial court. (*Shapiro v. Prudential Property & Cas. Co.* (1997) 52 Cal.App.4th 722, 730.)

We find the trial court erred because appellants have failed to demonstrate any damages. Appellants presented no evidence at trial to demonstrate they would have been entitled to permanent custody of the two boys. California law states the first preference for child custody is with

both parents or *either parent*. (Fam. Code, § 3040, subd. (a)(1).) California's public policy is to "assure that children have *frequent and continuing contact* with both *parents*." (Fam. Code, § 3020, subd. (b).) These preferences give way only where there is child abuse, neglect, or domestic violence in the home. (Fam. Code, § 3020, subd. (a), (c).) There is no dispute Joye is the boys' father, and thus became presumptively entitled to custody when Joan Cheyovich died. (Fam. Code. § 3040; *Estate of Barassi* (1968) 265 Cal.App.2d 282, 288.)

The evidence shows Joye testified in his deposition, presented as evidence at trial, as follows: In March 1992, after the boys' mother died, Joye discussed with the boys whether they desired to live in the United States with appellants, or return to France and live with him; both boys said they wished to return to France; Joye determined the boys should remain with appellants until June, in order to complete the school year, and allow Joye to arrange for child care in France, Joye advised appellants of these plans, and provided money to appellants to assist in supporting the boys until June. Following their return to France, the boys have lived at all times with Joye. This demonstrates Joye, presumptively entitled to custody, was ready, willing and able to shoulder his responsibilities as the boys' father and custodian, and in fact has done so.

On the other hand, appellants offered no evidence which rebutted the presumption the boys should have been placed in their father's custody. Appellants' brief cites to no competent or admissible evidence of any abuse, neglect, domestic violence, or any other behavior by Joye that would even arguably have warranted a trial court decision overriding the strong presumption in favor of parental custody and justified an award of custody to the

appellant grandparents. The temporary guardianship order of May 8, 1992 does not support an inference appellants would have prevailed in obtaining permanent custody of the boys. The temporary order was an appropriate interim measure – nothing more. Thus, although it is understandable and human that appellant grandparents would strongly wish to retain custody of their dead daughter's children, these natural human feelings do not afford the legal basis for terminating the father's custody rights.

Therefore, because appellants have failed to demonstrate any entitlement to permanent custody, respondents' alleged negligence in permitting Joye to take the boys from school caused appellants no injury which is legally compensable in damages.

Because we conclude respondents are entitled to judgment in their favor on all causes of action of appellants' first amended complaint, we need not consider the argument [sic] the new trial motion was granted in error.

DISPOSITION

The trial court's orders denying the "Ten Motions" and awarding sanctions to respondents are affirmed. The matter is reversed and remanded for the trial court to enter judgment in respondents' favor. Respondents to recover their costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

LILLIE, P.J.

NEAL, J.